Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT RELFORD, *et al.*,

Petitioners,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

On May 29, 1997, Petitioner Robert Relford (hereinafter referred to as Petitioner) was arrested for possession of drug paraphernalia (a crack pipe). Petitioner spent one work day in jail and had a member of his family call in and report that he was unable to report to work because he was sick. At no time did Petitioner advise his supervisors that he had been arrested for a drug related offense. The fact of Petitioner's arrest came to the attention of Robert Ramsey, then Director of the Division of Building Maintenance and Construction, sometime during June, 1997. Mr. Ramsey, based on the arrest, Petitioner's failure to report the arrest and additional observations, requested that Relford be given a drug test pursuant to the Urban County Government's Alcohol and Drug Free Workplace Guidelines and Procedure handbook.

On June 20, 1997, Ramsey called Petitioner into his office. He gave Petitioner a five day suspension for abuse of sick leave and failure to report his arrest. He also gave Petitioner a "Notification of Reasonable Cause Testing". Petitioner accompanied his supervisor to the testing site, but, upon advice of counsel, refused to take the required drug screen. Refusal to take a drug test is a violation of the Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook.

Charges against Petitioner were filed by Wally Skiba, Director of the Division of Human Resources and Sam Dunn, the Commissioner of the Department of General Services. The charges asked that the Civil Service Commission dismiss Petitioner for his violation of the Alcohol and Drug Guidelines. A hearing on the Charges was held on October 15, 1997. In its Opinion and Order, the Commission upheld the five

day suspension given to Petitioner for abuse of sick leave, but levied a thirty day suspension rather than dismissal for his refusal to take the drug test.

The Commission found that the Government had reasonable cause to require petitioner to submit to a drug test and that his failure to do so constituted grounds for dismissal. It also found, however, that dismissal was not warranted because the Government had failed to advise Petitioner adequately of the grounds for the order; the Government may have misled him as to the grounds and the consequences of his failure to test; and the reasonable cause testing guidelines in the Alcohol and Drug Guidelines were confusing.

Petitioner appealed these findings to the Fayette Circuit as provided in KY. REV. STAT. § 67A.290. The only issue on appeal before the trial court was whether there was sufficient evidence in the record to support the findings of the Commission. The trial court ruled that the Government had failed to follow its own policies and, therefore, the Commission's decision to impose any discipline was arbitrary. After the trial court issued its Opinion, Petitioner filed a Motion for Attorney's Fees and Costs. This motion was overruled and both parties appealed to the Court of Appeals. At the Court of Appeals, for the first time, Petitioner requested that the fees be awarded pursuant to 42 U.S.C. § 1988. The Court of Appeals upheld the trial court.

REASONS FOR DENYING THE WRIT

I.

KENTUCKY LAW PROVIDES THAT ATTORNEYS' FEES CANNOT BE AWARDED UNLESS A SPECIFIC STATUTE ALLOWS THE AWARD.

Before addressing Petitioner's 42 U.S.C. § 1988 arguments, it is imperative that the Court understand the forum within which this case arises. Petitioner was a classified civil service employee of the Lexington-Fayette Urban County Government at the time of the drug test ordered pursuant to the Government's Alcohol and Drug Free Workplace Policy. As a classified civil service employee, Petitioner could be dismissed only by the Lexington-Fayette Urban County Government Civil Service Commission after charges were filed and a hearing held on the charges. KY. REV. STAT. § 67A.280. There is no provision in this statute for the award of attorneys' fees to a classified civil service employee who is not dismissed by the Civil Service Commission.

The absence of any direct language regarding attorneys' fees is dispositive of this issue for purposes of state law. In *Louisville Label, Inc. v. Hildesheim*, Ky., 843 S.W.2d 321, 326 (1992), the Kentucky Supreme Court reiterated established Kentucky law as follows:

> Except for fee-shifting statutes which provide that a trial court may assess an attorney's fee for one party against the other, such as provided for in Civil Rights Act litigation by KRS 344.450 and in divorce litigation by KRS 402.220, the

> obligation to pay one's own attorney falls upon the person employing the attorney rather than upon the opposing litigant.

See also Holsclaw v. Stephens, Ky., 507 S.W.2d 462, 480 (1974) where the Kentucky Supreme Court held that "[w]ith certain exceptions not applicable here Kentucky follows the general rule which does not permit the allowance of attorneys' fees in the absence of a statute or contract expressly providing therefore." Petitioner does not seriously argue that Kentucky law provides support for his request for attorneys' fees.

II.

THE ONLY ISSUE BEFORE THE CIVIL SERVICE COMMISSION AND THE CIRCUIT COURT WAS WHETHER PETITIONER'S SUPERVISORS HAD CORRECTLY OR INCORRECTLY APPLIED THE DRUG AND ALCOHOL POLICY.

Petitioner asks this Court to accept a local government administrative action as a 42 U.S.C. § 1983 cause of action. Petitioner filed a separate action in the United States District Court for the Eastern District of Kentucky specifically challenging the constitutionality of the Alcohol and Drug Free Workplace Policy. (*See* Complaint, *Robert Relford, individually and Robert Relford, for and on behalf of all former, current and future Lexington Fayette Urban County Government Civil Service Employees v. The Lexington Fayette Urban County Government*, Case Number 98-334, 8/13/1998, Appendix A.) The federal case raises Section 1983 claims and requests attorneys' fees pursuant to Section 1988.

While Petitioner was not limited to either state or federal court to pursue his constitutional challenge to the Alcohol and Drug Free Workplace Policy, he was limited to state court to appeal the determination of the Civil Service Commission. KY. REV. STAT. § 67A.290. The petition he filed in Fayette Circuit Court was limited to the single issue of whether the Commission had acted arbitrarily. He did not allege any constitutional claims or refer to §§ 1983 and 1988. (*See* Petition, *Robert Relford v. Lexington-Fayette Urban County Government Civil Service Commission*, Fayette Circuit Court, No. 97CI3837, Appendix B.) Accepting Petitioner's argument at face value, any civil service employee who challenged a decision by the civil service commission could add a Constitutional element to the appeal and qualify for attorneys fees under § 1988. This is not the law.[1]

In *Barrow v. Flack*, 977 F.2d 1100 (7th Cir. 1992), the Court faced a case similar to this one. Mr. Barrow, a deputy sheriff, was suspended without a hearing. He filed an appeal to the Ford County Merit Board as well as a § 1983 action in federal district court. Upon receiving an adverse result before the merit board, he filed an appeal to the Ford County circuit court. Barrow's attorney wanted to recover fees for both his appearance in state and federal court. In denying the request, the court held:

> Section 1988 permits a court to shift to defendant only those legal fees incurred in "proceedings to enforce" a few listed federal statutes. When

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1. Petitioner is further hampered by the fact that he never suffered a constitutional injury. He was ordered to take a drug test and refused to do so. There was no "unreasonable" search or seizure.

> proceedings in state courts or agencies are part of the "enforcement" of § 1983, then time reasonably devoted to them is compensable. But rights under labor contracts and local civil service laws do not arise under the Constitution or federal statutes, and efforts to secure their benefits in state forums are not "proceedings to enforce" § 1983.

Petitioner would have this Court determine that his efforts not to be dismissed for failing to take a drug test was solely an effort to enforce § 1983. Such a ruling would turn every civil service hearing into a § 1983 action, a result not envisioned by the Kentucky General Assembly when it drafted the civil service statutes.

Petitioner relies heavily on *Dawson v. Birenbaum*, Ky., 968 S.W.2d 663 (1998) for the proposition that Kentucky allows the awarding of attorney's fees in cases where both state statutory and federal constitutional claims are raised. In *Dawson*, the plaintiff's license to practice opthalmology was placed on "monitor status", but the plaintiff was not provided a hearing as required by the regulatory statutes. Dawson filed suit in state court alleging both a statutory violation and a constitutional due process cause of action. The Kentucky Supreme Court determined that the plaintiff could receive attorneys' fees if his case met certain stringent requirements.

The facts in the case at bar do not raise the same issues as did *Dawson*. First, Petitioner did not file a direct challenge to the Alcohol and Drug Free workplace Policy in state court. He was disciplined pursuant to KY. REV. STAT. § 67A.280 and appealed the determination of the civil service commission to circuit court as provided in KY. REV. STAT. § 67A.290.

Pursuant to *Brady v. Pettit*, Ky., 686 S.W.2d 2 (1979), judicial review of a civil service commission decision is limited to a review of the record before the commission and any evidence of arbitrariness on the part of that body. The only means by which Petitioner could appeal the decision was through the dictates of KY. REV. STAT. § 67A.290. The trial court determined that the commission had been arbitrary because it disciplined Petitioner even though Petitioner's supervisors had not, according to the trial court, followed the Alcohol and Drug Free Workplace Policy. This process is exactly the one envisioned by the statutes and does not in any manner implicate a federal constitutional right.

Secondly, the *Dawson* court noted that a prevailing party has to show that his constitutional claim is substantial. In defining this standard, the court stated:

> The decisive question to be resolved is whether appellee's constitutional claim was substantial, and implied in this is a showing of probability of success on the merits. It is not enough to merely present a good argument or provoke thoughtful consideration. On motion for attorneys' fees, the trial court should analyze the case and make a summary determination of whether there was a likelihood of success.

Petitioner cannot show that his constitutional claim was substantial. He appended to the appeal before the Court of Appeals a claim for § 1988 fees because he had been subject to an illegal search when asked to undergo a drug test based on his arrest for possession of drug paraphernalia. There was no search or seizure, but the trial court analyzed Petitioner's constitutional claim, and made *no* summary determination

of a likelihood of success on the merits. In fact, the trial court held that the evidence was sufficient to support a holding that there was no constitutional violation. In the end, the trial court found that the Civil Service Commission was arbitrary because its decision was not supported by the Alcohol and Drug Fee Workplace Policy. Because Petitioner did not undergo an unlawful drug test, and was not denied due process, he cannot receive any remedy except that provided by state law, *i.e.*, review of the decision of the Commission.

III.

PETITIONER CANNOT BE CONSIDERED A PREVAILING PARTY BECAUSE HIS ACTION DID NOT RESULT IN A CHANGE OF POLICY OR ACTION BY THE RESPONDENT.

Even if Petitioner had properly raised a constitutional claim, he is not a prevailing party for purposes of § 1988 attorneys' fees. Petitioner argues at length that by prevailing in the quest to have his discipline overturned, he was a "catalyst" for change. "The paradigmatic situation for application of the 'catalyst theory' has been where the defendants voluntarily changed their behavior to eliminate the complained-of conduct." *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541 (3d Cir. 1992). There has been no change in the Government's Alcohol and Drug Free Workplace Policy since this case was filed. The trial court overturned Petitioner's discipline not because of a flaw in the policy, but because the Respondent failed to follow its own procedures. The mere incantation of §§ 1983 and 1988 are not sufficient to support an award of attorneys' fees in

this clearly state matter. *See Dawson v. Birenbaum*, Ky., 968 S.W.2d 663, 668 (1998), citing *Spencer v. South Carolina Tax Commission*, 316 S.W.2d 386 (So. Car. 1984).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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